U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: APR 10 2014 OFFICE: TEXAS SERVICE CENTER

IN RE: Applicant:

APPLICATION: Application to Register Permanent Residence or Adjust Status Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Elizabeth McCormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the Application to Register Permanent Residence or Adjust Status (Form I-485) and certified the decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed.

The applicant seeks to adjust status as the beneficiary of an approved employment-based immigrant petition pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The applicant seeks to adjust status under the provisions of section 245(a) of the Act, 8 U.S.C. § 1255(a), and use the provisions of section 245(i) of the Act, 8 U.S.C. § 1255(i). The applicant asserts that section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv) does not disqualify her from adjustment of status because she meets the requirements of portability under the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) (Public Law 106-313); section 204(j) of the Act, 8 U.S.C. §1154(j). The director determined that the applicant was ineligible for adjustment because a valid labor certification no longer supported that application and, accordingly, denied the application for adjustment of status. The director then issued a notice that was certified for review to the AAO pursuant to 8 C.F.R. § 103.4.

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Certifications by district directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

In the instant matter, the Form ETA 750 labor certification application was filed on April 10, 2000, and the Department of Labor (DOL) certified it on January 25, 2002. The petition's priority date is the date the labor certification application was accepted by DOL. *See* 8 C.F.R. § 204.5(d). Based on the certification of the Form ETA 750, the petitioner filed the Form I-140 petition on June 12, 2000, and it was approved on September 18, 2000. The beneficiary of the Form I-140, the applicant in this proceeding, filed the instant Form I-485, Application to Register Permanent Residence or Adjust Status, on May 16, 2001, based on the approved Form I-140. On June 26, 2001, the petitioner notified U.S. Citizenship and Immigration Services (USCIS) in writing that it was "no longer offering [the beneficiary] employment in the United States and is therefore no longer sponsoring him for permanent residence." Accordingly, the Director, Vermont Service Center, revoked the approval of the employment-based visa petition on April 1, 2002.

On September 1, 2004, counsel stated that the applicant had changed jobs and "meets the requirements" of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21).[1] The AAO does not agree.

Section 106(c) of AC21 amended section 204 of the Act by adding the following provision, codified as section 204(j) of the Act, 8 U.S.C. § 1154(j):

> *Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence*- A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

> *Long Delayed Adjustment Applicants*- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

The issue in this matter is whether the applicant is eligible to adjust status based on the portability provisions of AC21.

At the time AC21 went into effect, legacy Immigration and Naturalization Service (INS) regulations provided that an alien worker could not apply for permanent resident status by filing a Form I-485, application to adjust status, until he or she obtained the approval of the underlying Form I-140 immigrant visa petition. *See* 8 C.F.R. § 245.2(a)(2)(i) (2000). Therefore, the process under section 106(c) of AC21 at the time of enactment was as follows: first, an alien obtains an approved employment-based immigrant visa petition; second, the alien files an application to adjust status; and third, if the adjustment application was not processed within 180 days, the underlying immigrant visa petition remained valid even if the alien changed employers or positions, provided the new job was in the same or similar occupational classification.

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[1] It is noted that the applicant's new employer filed a Form I-140, Immigrant Petition for Alien Worker, on the applicant's behalf on August 16, 2006. The petition was accompanied by an ETA Form 9089 labor certification with a priority date of June 21, 2006. That petition was approved on September 13, 2006. On August 7, 2007, the applicant filed a new Form I-485, Application to Register Permanent Residence of Adjust Status, based on this approved immigrant visa petition. This application has not yet been adjudicated.

The available legislative history does not shed light on Congress' intent in specifically enacting section 106(c) of AC21. While the legislative history for AC21 discusses Congressional concerns regarding the nation's economic competitiveness, the shortage of skilled technology workers, U.S. job training, and the cap on the number of nonimmigrant H-1B workers, the legislative history does not specifically mention section 106(c) or any concerns regarding backlogs in adjustment of status applications. The legislative history briefly mentions "inordinate delays in labor certification and INS visa processing" in reference to provisions relating to the extension of an H-1B nonimmigrant alien's period of stay. *See* S. Rep. 106-260, 2000 WL 622763 at *10, *23 (April 11, 2000). In the 2001 Report On The Activities Of The Committee On The Judiciary, the House Judiciary Committee summarized the effects of AC21 on immigrant visa petitions: "[I]f an employer's immigrant visa petition for an alien worker has been filed and remains unadjudicated for at least 180 days, the petition shall remain valid with respect to a new job if the alien changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed." H.R. Rep. 106-1048, 2001 WL 67919 (January 2, 2001). Notably, this report further confuses the question of Congressional intent since the report clearly refers to "immigrant visa petitions" and not the "application for adjustment of status" that appears in the final statute. Even if more specific references were available, the legislative history behind AC21 would not provide guidance in the current matter since, as previously noted, an approved employment-based immigrant visa was required to file for adjustment of status at the time Congress enacted AC21.

AC21 allows an application for adjustment of status to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job.

The regulation at 8 C.F.R. § 205.1(a)(iii)(C) provides that upon written notice of withdrawal filed by the petitioner, the approval of the petition shall be automatically revoked. In this case, the petitioner's withdrawal of the visa petition prior to the Form I-485's pendency for 180 days rendered the applicant ineligible for adjustment of status under AC21. The crux of a portability analysis is the length of time that an unadjudicated Form I-485 is pending. In this case, the application for adjustment of status was pending for only 36 days before the petitioner requested that the petition be withdrawn.[2]

Counsel concluded in response to the Notice of Intent to Deny that the applicant qualified to port jobs under AC21 because more than 180 days passed between the date the I-485 was filed and the date the director actually denied that application on January 7, 2005. Counsel asserted that his conclusion is based on the "plain meaning" of the language of AC21; however, the plain meaning of the language leads to the opposite conclusion. The operative language in section 204(j) and section 212(a)(5)(A)(iv) of the Act states that the petition or labor certification "shall remain valid" with

[2] The automatic revocation of the petition occurred upon the filing of the petitioner's withdrawal, and required no further action on the part of USCIS to perfect the revocation.

respect to a new job if the individual changes jobs or employers. The petition in question automatically ceased to be "valid" when it was withdrawn by the petitioner on June 26, 2001.

The I-140 petition was withdrawn after the I-485 had been pending for just 36 days. This withdrawal triggered the automatic revocation of the approval of the petition and rendered the applicant ineligible for adjustment of status. The question of whether the applicant's new employer must establish the ability to pay the proffered wage is moot since the applicant is not eligible for the job portability provision under AC21.

It is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The director's decision is affirmed, the application is denied.